125-170

125-176

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 158.

THE UNITED STATES, APPELLANT,

vs.

JABEZ BURCHARD.

FILED OCTOBER 24, 1884.

No. 1332.

JABEZ BURCHARD, APPELLANT,

vs.

THE UNITED STATES.

FILED JANUARY 7, 1888.

APPEALS FROM THE COURT OF CLAIMS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 443.

THE UNITED STATES, APPELLANT,

vs.

JABEZ BURCHARD.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

JABEZ BURCHARD
vs.
THE UNITED STATES. } No. 14022.

I.—*Claimant's petition.*—*Filed September* 6, 1883.—*A. H.*

To the honorable the Judges of the Court of Claims:

The petition of Jabez Burchard respectfully shows to your honors:

1. That he is a citizen of the United States and an officer of the Navy thereof, to wit, an assistant engineer.

2. That he entered the Navy March 14, 1865, was honorably discharged January 9, 1868, re-entered Sept. 1, 1870, and was placed on the retired list as assistant engineer Oct. 26, 1874, on account of physical disability, under sections 1448 et seq. of the Revised Statutes.

3. That such disability arose from an incident of the service, but that the Retiring Board before which petitioner was ordered, not having the proper evidence before it, reported that there was no evidence that the disability originated in the line of duty, and that in consequence of such report petitioner was retired on furlough pay.

4. That thereafter petitioner appealed to the Secretary of the Navy for a reconsideration of his case, and that upon a full consideration of his said appeal, the evidence in support thereof and a report of the Solicitor
2 of the Navy Department, the Secretary decided that the disability of petitioner did originate in the line of duty.

5. That thereafter petitioner was transferred by the President, by and with the advice and consent of the Senate, from the furlough to the retired pay list, April 1, 1878, such transfer to take effect from the date of his retirement as aforesaid.

Your petitioner claims that under sections 1453, 1556, 1588, and 1594, Revised Statutes, he was entitled, after such transfer, to be paid at the rate of $1,275 per annum, but that such pay has been wholly denied and refused him, and that he has only been paid at the rate of $850 per annum since the date of said transfer. Wherefore your petitioner prays judgment against the United States in the sum of $2,337.50.

Your petitioner says that he is the sole owner of this claim, and has never assigned the same or any portion thereof; that he is justly entitled to the amount herein claimed, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Government of the United States, and has never in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government; and that he has appointed John Paul Jones, of Washington, D. C., his attorney for the prosecution of this claim.

JABEZ BURCHARD,
Assist. Eng., U. S. Navy.

Jabez Burchard, being first duly sworn according to law, on oath says that he is the petitioner named in the foregoing petition; that he signed the same, and that the matters and things therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 5th day of September, 1883.

[L. S.] E. H. BAILEY,
Not. Pub.

3 II.—*General traverse.*—*Filed Oct.* 6, 1883.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

4 III.—*Defendants' counter-claim.*—*Filed Dec.* 11, 1883.

And now come the United States, by their Attorney-General, and say that Jabez Burchard, before and at the time of the commencement of this suit, was and still is indebted to the said defendants in a large sum of money, to wit, $1,168.75, by reason of having been erroneously paid and allowed the said sum by the accounting officers of the Treasury Department in excess of what was rightly and justly due said Burchard for his salary as a retired assistant engineer from April 1, 1875, to March 31, 1878.

Wherefore the Attorney-General prays that judgment be entered against the plaintiff for the sum of $1,168.75 aforesaid.

THOMAS SIMONS,
Assistant Attorney-General.

IV.—*Claimant's replication to counter-claim.*—*Filed January* 10, 1884.

For replication to the defendants' counter-claim the claimant, by his attorney, denies that he is indebted to the defendant as alleged.

JNO. PAUL JONES,
Att'y of Record.

Sworn to and subscribed before me this 10th day of January, 1884.
[SEAL.] JOHN RANDOLPH,
Ass't Cl'k Ct. of Claims.

5 V.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant was appointed second assistant engineer in the Navy, to date from September 1, 1870, his title being subsequently changed, by act of February 24, 1874, ch. 35 (Supplement to Rev. Stat., 5), to that of assistant engineer.

II.

Under the provisions of Revised Statutes, section 1454, a Retiring Board found that he was incapacitated for active service, and that his incapacity was not the result of any incident of the service, and said decision was approved by the President. In accordance therewith he was retired on furlough pay October 26, 1874, as set out in the notice given to him, as follows:

NAVY DEPARTMENT,
Washington, 26 October, 1874.

SIR: The Retiring Board before which you recently appeared found you incapacitated for duty by disability, which did not originate in the line of duty, and the President of the United States, concurring in opinion with the board, has directed that you be retired on furlough pay.

You will accordingly be so retired from this date.

Respectfully,

WM. REYNOLDS,
Act'g Secretary of Navy.

Assistant Engineer JABEZ BURCHARD,
U. S. Navy, Media, Pa.

March 1, 1877, the Secretary of the Navy addressed the following letter to the Fourth Auditor of the Treasury:

NAVY DEPARTMENT,
March 1st, 1877.

SIR: Upon a full review of all the facts in the case of Assistant Engineer Jabez Burchard, U. S. Navy, the Department is of the opinion that the causes which incapacitated him for active duty were incident to the service, and that he should have the higher rate of pay allowed to retired officers by section 1588 of the Revised Statutes.

Very respectfully,

GEO. M. ROBESON,
Secretary of the Navy.

Hon. S. J. W. TABOR,
4th Auditor.

6 III.

March 1, 1878, the Secretary of the Navy addressed the following communication to the President:

NAVY DEPARTMENT, 1 *March*, 1878.

SIR: I have the honor to submit herewith a nomination of Assistant Engineer Jabez Burchard for transfer from the furlough to the retired pay list of the Navy, in conformity with section 1594 of the Revised Statutes.

I am, sir, with great respect,

R. W. THOMPSON,
Secretary of the Navy.

The PRESIDENT.

March 1, 1878, the President made the following nomination:

To the Senate of the United States:

In accordance with section 1594, Revised Statutes, I nominate Jabez Burchard, assistant engineer, to be transferred from the furlough to the retired pay list of the Navy from the 20th October, 1874.

R. B. HAYES.

WASHINGTON CITY, 1 *March*, 1878.

March 25, 1878, the Senate consented to the appointment, as follows:

SENATE OF THE UNITED STATES, *March* 25, 1878.

Resolved, That the Senate advise and consent to the appointment of Assistant Engineer Jabez Burchard to be transferred from the furlough to the retired pay list of the Navy from the 26th October, 1874, agreeably to the nomination.

The President issued to the claimant the following letter:

NAVY DEPARTMENT,
Washington, 1st April, 1878.

SIR: You are informed that, under section 1594 of the Revised Statutes, and agreeably to the confirmation by the Senate, you are, by direction of the President, transferred from the furlough to the retired pay list of the Navy from the 26th of October, 1874.

Respectfully,

R. W. THOMPSON,
Secretary of the Navy.

Assistant Engineer JABEZ BURCHARD,
U. S. Navy, Media, Penn.

IV.

From October 26, 1874, to March, 1877, he was first paid furlough pay under Revised Statutes, section 1454, to wit, at the rate of $500 a year, that being one-half of the pay to which he would have been entitled if on leave of absence. (Rev. Stat., sec. 1593.)

After the letter of the Secretary of the Navy, in March, 1877, set out in the second finding, he was paid for the future up to April 1, 1878, when he was transferred by the President's commission from furlough to retired list pay, at the rate of $1,275 a year, under the first clause of section 1588 of the Revised Statutes, that being 75 per centum of the sea pay for the grade or rank which he held at the time of his retirement.

He was also paid for the past time from October 26, 1774, to March, 1877, the difference between the furlough pay, previously received, and the 75 per cent. of sea pay mentioned in the first clause of said section 1588; that is, the difference between $500 a year previously received by him and $1,275 a year.

7 He has therefore been paid 75 per cent. of the sea p y for th grade or rank which he held at the time of retirement, $1,275 year, from October 26, 1874, the time he was placed on the retired list, t April 1, 1878, when he was transferred from furlough to retired list pay

Since April 1, 1878, he has been paid $850 a year, under the second clause of said section 1588, that being one-half the sea pay provided for the grade or rank held by him at the time of his retirement, and therein given to all other officers not previously enumerated in said section.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that neither the claimant nor the defendants are entitled to recover, and that the petition and counter-claim be both dismissed, for the reason stated in the opinion.

VI.—*Opinion of the court.*

WELDON, J., delivered the opinion of the court:

September 1, 1870, claimant was commissioned second assistant engineer in the Navy. October 6, 1874, he was ordered to appear before the Retiring Board for examination. The Board found him "incapacitated for duty by disability which did not originate in the line of duty." The finding was approved by the President, October 26, 1874, and the claimant was thereupon retired upon furlough pay as required by section 1454 of the Revised Statutes.

What was his retired furlough pay?

Section 1593 provides that officers retired "on furlough pay shall received only one-half of the pay to which they would have been entitled if on leave of absence on the active list." Section 1556 provides that leave of absence pay for second assistant engineers (now assistant engineers by act of February 24, 1874, chapter 35, Supplement Rev. Stat., 5) on the active list shall be $1,000 a year. Therefore, claimant's pay after retirement was $500 a year.

March 1, 1878, the claimant was nominated by the President to be transferred "from the furlough to the retired pay list of the Navy from October 26, 1874," in accordance with section 1594 of the Revised Statutes. The nomination was confirmed by the Senate, and April 1, 1878, the transfer was made. By this transfer to "the retired pay-list" claimant became entitled under the second clause of section 1588, Revised Statutes, to one-half of the sea pay of a second assistant engineer on the active list. The sea pay on the active list (Rev. Stat., sec. 1856) is $1,700 a year. Claimant's pay, therefore, by this transfer, was raised from $500 to $850 a year.

It follows that claimant's pay from October 26, 1874, to April 1, 1878, was at the rate of $500 a year, and after April 1, 1878, at the rate of $850 a year. This was the opinion of the Attorney-General. (16 Opinions, 22.)

Several objections are raised to these conclusions.

1. It is said that the claimant by this transfer became entitled to receive the pay provided for in the first clause of section 1588 and not the second clause. The first gives the class who come within it 75 per cent. of their sea pay, while the second gives to another class only 50 per cent. of their sea pay.

To which class did claimant belong? Most clearly to the second. The

cause of incapacity marks the division line between the two classes. Those whose incapacity is caused by the service are on one side of the line; those whose incapacity is not caused by the service are on the other.

By the finding of the Retiring Board and the approval and decision by the President thereon it was officially determined that the incapacity of the claimant was not caused by the service, and so he comes under the second clause of that section.

2. This finding, it is said, was changed by the letter of the Secretary of the Navy. "The Department," says the Secretary, under date of March 1, 1877, "is of the opinion that the causes which incapacitated him for active duty were incident to the service." Unfortunately for the claimant, the Retiring Board, by the President's approval, and not "the Department," was authorized by law to settle that fact (Rev. Stat., sec. 1451 and 1454), and by the finding of that Board and the approval of the President, it had been settled more than two years before the "opinion of the Department" was known or formed. At the time the opinion of the Department was promulgated the Secretary had no more power to revise the finding of the Board and reverse the approval and action of the President thereon than he had to overrule a decision of the Supreme Court. If at that late day he had a right to change the finding of the Board so as to affect favorably the pay, credit, or status of a retired officer, he had also the power to change such findings so as to affect unfavorably the pay, credit, and status of other retired officers. That is to say, he could, at his pleasure, regardless of the Retiring Board and the President, change retired officers from the 75 per centum clause of section 1588 to the 50 per centum clause, and vice versa, by simply announcing that "in the opinion of the Department" the cause of the incapacity of the retired officers did not originate in the way set out in the finding of the Retiring Board. This might be done as often as "the opinion of the Department" under its ever-changing supervision might fluctuate.

3. It is further said that this transfer of the claimant "from the furlough to the retired pay list" not only changed his rate of pay, but incidentally had the effect to wipe out absolutely the finding of the Retiring Board, and inserting in its place that the cause of his incapacity did originate from the service. We do not concur in this theory. In the opinion of the court that finding remained in claimant's record, and determined his position to be in the second clause of section 1588. This is not a new question. It was decided by this court in Magaw's Case (16 C. Cls. R., 3), and Morse's Case (16 C. Cls. R., 12).

4. It is again said that the transfer took effect October 26, 1874, so that even under the above ruling claimant would be entitled to receive $850 a year during the whole period of his retirement.

It is true that the President's nomination stated the transfer to be from October 26, 1874, and the Senate advised and consented to the nomination in that form and from that date; but what was the law? The law must control. The House participates in making the law, and the President and Senate cannot change it through the process of making
9 and advising and consenting to a nomination. All the power of the President in the premises is derived from the Revised Statutes, which provides as follows:

"SEC. 1594. The President, by and with the advice and consent of the

Senate, may transfer any officer on the retired list from the furlough to the retired pay list."

This section authorizes the transfer—nothing more. The President and Senate make the transfer; other officers consider its legal effect. If the legal effect of a simple transfer does not in itself reach back to the time of retirement, the President and Senate cannot so extend it by inserting in the nomination their construction of the law, and thereby exercise a power not conferred.

We are unable to find any words in section 1594 indicating that a simple transfer would have any retroactive effect, nor that authorizes the President and Senate to lengthen, diminish, or alter the legal effect of such transfer.

In Collins Case (15 C. Cl., R. 34) this court said:

"There is a class of cases with which this should not be confounded, cases where officers, for the purposes of rank, are appointed and commissioned by the Executive as of a date earlier than the day of appointment, without any special act of Congress. Such was the case of Surgeon Du Barry, in which Attorney-General Clifford very strongly advised that the appointee was not entitled to pay prior to the time of his actual appointment. (4 Opin. Att'ys Gen., 603.) It is clear that the Executive—the President alone, or the President with the advice and consent of the Senate—by antedating the commission or appointment of a public officer, without legislative authority, cannot create a liability on the part of the United States to pay him a salary for the time he was not in service, but Congress, the legislative branch of the Government, may by law create such liability, and may allow back pay to any public officer in consideration of past services or for any other cause which they deem sufficient."

The court adheres to the opinion then expressed.

After April 1, 1878, claimant was paid at the rate of $850 a year, which was the amount, in the opinion of the court, to which he was entitled.

COUNTER-CLAIM.

From October 26, 1874, to April 1, 1878, the claimant was paid at the rate of $1,275 a year, as appears by Finding IV, amounting in all to $4,370. In the opinion of the court he was entitled to be paid for that time only at the rate of $500 a year, amounting in all to $1,714. He has therefore been overpaid $2,656.

According to these views, the defendants would be entitled to recover on their counter-claim the sum of $2,656.

Inasmuch, however, as the conclusion of the majority of the court restricts the power exercised by the President in antedating the transfer, and of the Senate in advising and consenting thereto in that form, and inasmuch as the views here expressed are not altogether agreed to by some members of the court, in order that the case may be heard in the Supreme Court on appeal, if the parties so desire, the court directs that the petition and counter-claim be dismissed.

10 VII.—*Final judgment.*

At a Court of Claims held in the city of Washington on the 4th day of February, A. D. 1884, judgment was ordered to be rendered as follows: The court, on due consideration of the premises upon the petition of the

claimant, finds for the defendants, and upon the counter-claim of the defendants finds for the claimant, and do order, adjudge, and decree that the petition of the claimant and the counter-claim of the defendants be dismissed.

11 VIII.—*Application of defendants for allowance of appeal.—Filed May 2, 1884.*

From so much of the judgment rendered in the above-entitled cause on February 4, 1884, as directs that defendants' counter-claim for $1,168.75 be dismissed, the defendants, by their Attorney-General, on the 2nd day of May, 1884, make application for and give notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

And now, to wit, May 5, 1884, it is ordered that the appeal filed on behalf of defendants on the 2nd instant be allowed as prayed for.

12 IX.—*Application of claimant for allowance of appeal.—Filed May 2, 1884.*

From the judgment rendered in the above-entitled cause, the claimant by his attorney makes application for and hereby gives notice of an appeal to the Supreme Court of the United States.

JOHN PAUL JONES,
Att'y of Record.

And now, to wit, May 12, 1884, it is ordered that the application of the claimant for an appeal filed on the 2nd inst. be allowed.

13 In the Court of Claims.

X.

JABEZ BURCHARD
vs.
THE UNITED STATES. } No. 14022.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleading in the above entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the defendants for allowance of appeal to the Supreme Court of the United States and the allowance of same by the court, of the application of claimant for allowance of appeal to said Supreme Court and the allowance of same by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 28th day of August, A. D. 1884.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 443. The United States, appellant, vs. Jabez Burchard. Court of Claims. Filed 24th October, 1884.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

NO. 698. HOWARD D. POTTS vs. THE UNITED STATES.

NO. 1332. JABEZ BURCHARD vs. THE UNITED STATES.

NO. 158. THE UNITED STATES vs. JABEZ BURCHARD.

Appeals from Court of Claims.

BRIEF FOR APPELLANTS, POTTS and BURCHARD.

JOHN PAUL JONES,
ROBT. B. LINES,
Counsel for Potts and Burchard.

MILANS, PR.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 698. HOWARD D. POTTS *vs.* THE UNITED STATES.

No. 1332. JABEZ BURCHARD *vs.* THE UNITED STATES.

No. 158. THE UNITED STATES *vs.* JABEZ BURCHARD.

APPEALS FROM COURT OF CLAIMS.

STATEMENT OF CASE.

Potts and Burchard claimed below the difference between half and three quarters "sea pay" as retired assistant engineers in the Navy.

Being physically disabled, both were examined by retiring boards under Sections 1448 to 1454 Revised Statutes, (Appendix A).

If the board had reported the disability an incident of service each would have received three quarters sea pay under Sec. 1453 and Sec. 1588, (post.)

The board reported the disability not incident to the service, and both were retired on furlough pay under Sec. 1454.

Sec. 1593, "Officers placed *on the retired list on furlough pay* shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list."

The active pay of assistant engineers under Sec. 1556 (p. 266) is graded as follows:

	At sea.	On shore duty.	On leave.
1st 5 years, . . .	$1,700.	$1,400.	$1,000.
2d 5 years, . . .	1,900.	1,600.	1,200.

Potts having served 13 years was therefore paid $600; and Burchard, who had served only four years continuously (but seven altogether), was paid $500.

In both cases investigation, after approval, convinced the Secretary of the Navy that the board's report was unjust and that their disability arose from incident of service. In Potts' case the medical officers of the retiring board had so reported, but were deliberately overruled by the line officers, (Record, p.).

The President then nominated both officers and the Senate confirmed them under Sec. 1594, as follows:

"Sec. 1594. The President, by and with the advice and consent of the Senate, may transfer any officer *on the retired list* from the furlough to the *retired pay* list."

Both officers claimed that they were transferred to the same list on which they would have been placed under Sec. 1454 if the board had originally reported their disability incident to the service. This list is found in the first clause of Sec. 1588, as follows:

"Sec. 1588. The pay of all officers of the Navy, who have been retired after 45 years' service after reaching the age of 16 years, or who have been, or may be retired after 40 years' service upon their own application to the President, or on attaining the age of 62 years, *or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein*, shall, when not on active duty, be equal to 75 per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement."

This claim was in accordance with the views of the Navy Department, and of the accounting officers at the time, (Burchard record, p. 3).

In 1878, however, the views of the latter were changed and the appellants were thereafter paid half sea pay under the second clause of Sec. 1588, viz:

"The pay of all other officers on the retired list (excluding those above specified) shall, when not on active duty, be equal to one half the sea pay provided by this chapter for the grade or rank held by them at the time of retirement."

The petitions, claiming the difference between half and three quarters sea pay after transfer, were dismissed below; that of Burchard in an opinion not assented to by all the judges, (Record, p. 7); that of Potts without argument or opinion and on the authority of Burchard's case, it having been filed to bring the question here free from the complication of the

COUNTER CLAIM IN U. S. *vs.* BURCHARD.

This was for $1,168.75 paid Burchard as difference between furlough and three quarters pay from Oct. 26, 1874, (the date of his retirement,) to April 1, 1878, (date of his transfer by nomination and confirmation). This payment was made on supposed authority of Secretary Robeson's letter of March 1, 1877, informing the Fourth Auditor that upon full review of the facts he found Burchard's disability caused by incident of service, (Burchard record, p. 3). The counter claim for recovery of this sum was also dismissed below and cross appeal taken.

Should it appear that this payment was without authority when made, the following questions will arise:

1. Whether, as money voluntarily paid in mistake of law, it can now be recovered.

2. Whether the transfer did not, as expressed in the

nomination and confirmation (Record, pp. 2, 3) relate back to the date of retirement and entitle Burchard from such date to three quarters sea pay (if his appeal be sustained,) or to half sea pay (if his appeal be overruled).

On their appeals Potts and Burchard submit the following

ASSIGNMENTS OF ERROR.

The court below erred:

1. In holding that the transfer under Sec. 1594 was to half instead of three quarters sea pay.

2. In holding that the half sea pay officers, called in Sec. 1588 "all other officers," constitute a "list" within the meaning of Sec. 1594.

3. In holding that the half sea pay officers form "*the retired pay list*" specified in Sec. 1594.

4. In holding that the finding of the board as to the cause of retirement determines the position of an officer after transfer.

5. In holding that the words "all other officers" in Sec. 1588 includes furlough pay officers after transfer, (though not before).

6. In holding that the issue here was decided in Magaw's and Morse's cases, (16 Ct. Cls., Rep).

7. In dismissing the petition.

ARGUMENT.

I.

REASON AND HISTORY OF THE LAW.

The court below cite with approval (p. 5, Burchard record), an opinion of Atty. Gen. Devens, in which he says:

"The right to transfer from the furlough list to the *retired list*" (ignoring the fact that the furlough

officer is already in the very words of Sec. 1594 "on the retired list") "is undoubtedly intended to enable the Executive *to exercise an act of grace,*" (or in other words favoritism) "*and to add to the pay* of the officer upon the furlough pay list, under Sec. 1594 of the Revised Statutes; but when the party is placed *upon the retired list* the terms and conditions of his retirement determine the pay which he is to receive."

With great respect to the Attorney General, we submit that if any other intent can be found in Sec. 1594 it ought to be preferred to the one he ascribes to it. Such an intent would be carried out just as well by leaving on the furlough list Potts and Burchard, who suffered from the unjust finding of a retiring board, and transferring without any reason any other officer who did not so suffer, or by doing away with the furlough list altogether.

It is belittling the Executive and that great body which participates with him in the making of treaties and the making of officers to suppose a *quasi* constitutional function to be confided to them for such a purpose. Why should Congress enact laws, presumably just, retiring officers on furlough pay and then suggest that the President nullify them with the aid of the Senate?

We contend that Sec. 1594 was intended to enable the President and Senate to perform an act of justice, not of grace. Retiring boards are not infallible, as these records abundantly show, and Presidents sometimes approve their reports perfunctorily and inadvertantly.

Sec. 1594 affords a *locus poenitentiae* and enables the President to re-examine his action, receive new evidence, and then, the Senate consenting, not to "add to the pay of the officer" without reason, but to restore to him the pay of which he was unjustly deprived.

No officer goes on the furlough pay list but for physical disability reported by a board not incident to the service.

If the report is true, no injustice is done him and he ought not to be advanced. If it is erroneous, no justice can be done him except by putting him where the contrary report would have placed him, on the three quarter pay list. The remedy should be adequate and co-extensive with the evil.

That this is the true theory of Sec. 1594, appears from its history. The marginal notes show it to have been taken from Sec. 3, of the act of January 16, 1857, (11 Stats. 154,) a clause of which reads:

"The President shall be, and he is hereby, authorized, with the advice and consent of the Senate, to transfer any officer from the furlough to the *reserved* pay list.

In its title the act of 1857, is declared to be amendatory of the act of February 28, 1855, (10 Stats. 616,) and its sole purpose was to remedy the wrongs committed by retiring boards under the act amended, which was the first providing for the retirement of naval officers.

The act of 1855 gave large scope to the retiring boards, empowering them to drop officers wholly from the service, or to retire them upon either of two rates of pay, "reserved," (now "retired,") or "furlough" pay. The act of 1857 authorized their reinstatement when dropped, their restoration from the retired to the active list, and their transfer from the furlough to the reserved pay list by the President and Senate. The first two powers under the act of 1857 have disappeared from the statutes, but the last remains in unimpaired vigor and the reason for its enactment has not been changed.

The injustice of the government's theory will appear as clearly when we see where it places the transferred officer, as when we see where it fails to place him.

Aside from physical disability, age, or length of service there is but one cause of retirement,

viz: failure to pass examination for promotion, under Secs. 1496 and 1447, R. S., (Appendix B). The officers who have thus failed (with a few retired under obsolete acts) constitute the "all other officers" of the second clause of Sec. 1588, who receive half pay, and it is with them that the appellees would group officers like Potts and Burchard, whom the President and Senate find to have lost their health in the service, and to have been unjustly treated by a retiring board.

It may be said that officers may also be unjustly treated by a promoting board and retired on half pay. That is true, but if the laws afford them no remedy that is no reason for refusing to enforce in behalf of others, the clearly adequate remedy of Sec. 1594.

II.

THE LETTER OF THE LAW.

1. Sec. 1594 authorizes a transfer from the furlough pay "list" to another "list."

The words "all other officers" do not describe a "list."

The word "list" is defined by Webster to mean "roll, catalogue, register, inventory, schedule." The general "retired list" is properly so-called, because it embraces and designates all officers retired from active service; so the subordinate furlough and three quarter lists are specific, well defined "rolls, catalogues, or schedules" of officers retired for certain designated causes and classified together. But the second clause of Sec. 1588 does not contain a roll, catalogue, schedule or classification. It refers in the most general terms to "all other officers on the retired list" just as a tariff act, after ingenuity of specification has been exhausted, may impose a certain duty upon "all other articles not heretofore enumerated." No one would call such a reference to unenumerated articles a "list, roll or schedule."

It is to be noticed that Sec. 1437 providing retirement for officers failing to pass examination uses only the words "retired list," not designating any sub list. They therefore fall into the general catch-all of the half pay, "all other officers" clause of Sec. 1588.

2. The three quarter list is specifically designated as "the retired *pay* list."

A capital error in Atty. Gen. Devens' opinion above quoted and relied on by the court below is that he omits the word "pay" from Sec. 1594, and speaks of the officer's transfer "from the furlough to *the retired list*," on which he is already, in the words of the section itself. Starting from a premise so palpably erroneous, it is not strange that he should have reached an erroneous conclusion.

Sec. 1594 authorizes a transfer from the furlough to "the retired *pay* list." Conceding that the half pay "all other officers" form a "list," properly speaking, they are not the "retired pay list."

Sec. 1453 directs that officers retired for disability found incident to the service shall be given "retired pay," not mentioning the rate. Those officers are grouped in the first clause of Sec. 1588, and receive three quarters sea pay. It is clear, therefore, that "retired pay," in Sec. 1453, is a specific, technical term meaning three quarters sea pay, and if it is so in Sec. 1453, why is not so in Sec. 1594?

3. Suppose the revisers had left, in Sec. 1594, the language of the act of 1857, as they found it, authorizing a transfer from the furlough to "the *reserved* pay list,"—the excepted list, the list set apart. Would it not then be clear which list was meant? Could it be held that the reserved pay list was the *residuum* of all officers not reserved, excepted, and set apart? Sec. 1594 should be construed as though there had been no change of language.

A codifying statute should only be construed to

change existing law where the intent of the legislature is clear to make such change; or when the language of the code plainly requires such construction.

Conger *vs.* Barker, 11 Ohio St., 13.

When necessary for the interpretation of the language of a code reference will be had to the origiual statute.

Hammock *vs.* Farmers' Loan and Trust Co., 105 U. S., 85.

U. S. *vs.* Bowen, 100 U. S., 508.

4. But if both clauses of Sec. 1588 be held to describe a "list" and a "retired pay list," it would still be open to inquiry whether the three quarter or half pay list would most likely be spoken of as "*the* retired pay list." If it were found that the former embraced 321, out of 364, retired officers, and the latter less than 20; the conclusion would be irresistible that the former list would be intended when "*the* retired pay list" was spoken of. Such is the fact, (Ho. Ex. Doc. 111, 49th Cong., 1st Sess.)

Ad ea quae frequentius accidunt jura adaptantur.

5. Again, if we conclude that the law is ambiguous, another rule of interpretation may be invoked as laid down by Mr. Justice Story in U. S. *vs.* Morse, (3 Story, 87,) and followed in U. S. *vs.* Collier, (3 Blatchf., 325,) "When the words of a statute prescribing compensation to a public officer are loose and obscure and admit of two interpretations they should be construed in favor of the officer."

III.

The fourth, fifth and sixth specifications of error may be treated together.

1. After transfer the cause of retirement cannot, as argued in the opinion below, determine the officer's pay. If it did the transfer would have no effect on pay, for Sec. 1593 is just as imperative as Sec. 1588,

and it declares that officers retired on furlough pay *shall receive* only one half of leave pay. How can it be said that the finding of the retiring board "remained in the claimant's record," and at the same time that it "determined his position to be in the second clause of Sec. 1588?"

The finding of the board determined the pay on which the claimant should be originally retired, viz: furlough pay. The law transferring him to the *retired pay list*, and the first clause of Sec. 1588, giving that list three quarters pay determine his pay after transfer.

2. The first clause of Sec. 1588 does not say that officers whose disability "*has been found by a retiring board* to have resulted from wounds or injuries received in the line of duty or from sickness or exposure therein" shall receive three quarters pay. It says officers "who have been or may be retired * * * on account of incapacity resulting from * * * wounds or injuries received in the line of duty or from sickness or exposure therein," &c.

The cause of the incapacity is a question of fact, to be passed upon by the board in the first instance undoubtedly, but which Congress might well empower the President and Senate to retry and decide anew.

There is nothing so sacred about the conclusions of retiring boards as to exclude the supposition that Congress meant to give somebody jurisdiction to re-examine and reverse them in a proper case. The President is required to concur in them in the first instance, and there is no reason why he should not have authority to review his own acts if justice demands it.

3. If Congress had used the words "three quarter list" instead of "retired pay list" in Sec. 1594, as it was competent for Congress to do, who would say that a transferred officer should not receive three quarter pay? Yet the argument based on the finding of the

board as to the original cause of retirement would be just as strong then as it is now. Sec. 1593 would still read that officers retired on furlough pay should receive one half of leave of absence pay, and Sec. 1588, second clause, would still give "all other officers" half sea pay, and they would control transferred officers just as much as they do now, and no more.

4. It is said in the opinion in Burchard's case (p. 6) that the question here was decided by the court below in Magaw's and Morse's cases, (16 Ct. Cls. Repts., 3). That is a great mistake. In those cases the claim was, and it was the only claim, that officers retired on furlough pay were, *before transfer*, entitled to half sea pay under the "all other officers" clause of Sec. 1588. The court, speaking through his honor, Judge Davis, denied the claim, and said:

"No possible force can to be given to these sections, (1593 and 1590,) unless they are treated as exceptions to the broad rule laid down in Sec. 1588, that the unenumerated retired officers shall receive half sea pay."

If Sec. 1593 excepts the furlough officer, before transfer, from the broad language "all other officers," why may not Sec. 1594 continue the exception after transfer? So far as it goes, Judge Davis' opinion is in line with the construction for which we contend.

IV.

THE COUNTER CLAIM.

1. Whether Burchard's appeal be or be not sustained the judgment dismissing the counter claim should be affirmed, because it seeks to recover money voluntarily paid under mistake of law. It has been held in a number of cases that this cannot be done.

Elliott *v.* Swartwout, 10 Pet., 137, followed by the Court of Claims in a number of cases, the last of which is

Mullett *v.* The U. S., 21 C. Cls., 487.

It is to be noted that the claim and counter claim are for entirely different periods of time. The claim does not seek to re-open the account to which the counter claim relates. The former is for pay since April 1,1878, the latter for pay before that time, (Record, pp. 1, 2).

2. Still another ground might be found for dismissing the counter claim if Burchard's appeal be sustained. The President in his nomination, and the Senate in its vote of confirmation, expressed the intention to have the transfer to take effect by relation from the date of retirement, viz: Oct. 26, 1874, when the injury to the officer was originally committed. The retroactive effect of Sec. 1594 is not expressed, but it is submitted that it may be implied from the intent of the section.

3. In any event the counter claim can only be allowed for the amount claimed on page 2 of the record, viz: $1,168.75, and not for the amount said by the court on page 7 to have been overpaid.

JOHN PAUL JONES,
ROBERT B. LINES,
For Appellants, Potts and Burchard.

APPENDIX A.

Revised Statutes, U. S., title XV., The Navy; ch. 3, Sec. 1448. Whenever any officer on being ordered to perform the duties appropriate to his commission, reports himself unable to comply with such order, or whenever, in the judgment of the President, a officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a board of not more than nine, nor less than five commissioned officers, two fifths of whom shall be members of the medical corps of the Navy. Said board, except the officers taken from the medical corps, shall be composed as far as may be of seniors in rank to the officer whose disability is inquired of.

Sec. 1449. Said board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court-martial and of a court of inquiry as may be necessary.

Sec. 1450. The members of said board shall be sworn in each case to discharge their duties honestly and impartially.

Sec. 1451. When said retiring board finds an officer incapacitated from active service, it shall also find and report the cause which, in its judgment, produced his incapacity, and whether such cause is an incident of the service.

Sec. 1452. A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval or orders in the case.

Sec. 1453. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity if the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service, *with retired pay*, as allowed by chapter 8 of this title.

Sec. 1454. When said board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on *furlough pay*, or wholly retired from service with one year's pay, as the President may determine.

APPENDIX B.

Sec. 1496, (ch. 4). No line officer below the grade of commodore, and no officer not of the line, shall be promoted to a higher grade on the active list of the Navy until his mental, moral and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President.

Sec. 1447, (ch. 3). When the case of any officer has been acted upon by a board of naval surgeons and an examining board for promotion as provided in chapter 4 of this title, and he shall not have been recommended for promotion by both of the said boards, he shall be placed upon the retired list.

125-146

Office Supreme Court U. S.
FILED.
FEB. 6 1888
JAMES H. McKENNEY.
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1332.

BURCHARD VS. THE UNITED STATES

MEMORANDUM SUPPLEMENTARY TO BRIEF FOR APPELLANT.

I.

As to dismissal under Rule IX.

Owings *vs.* Tiernan. (10 Pet., 24). *Appeal not docketed at the return term.* Motion to docket (made contemporaneously with motion to docket and dismiss) allowed, and appellant given until 1st of March to file bond.

VanRenssaeler *vs.* Watts, (7 How., 784).

Edwards *vs.* United States, (12 Otto, 575). Transcript of record filed, but fee bond not given in time; no motion to docket and dismiss being made before fee bond given, the court denied motion made afterwards. That is this case except that here there is no motion to dismiss.

U. S. *vs.* Pacific R. R. Co., and Pacific R. R. Co. *vs.* the U. S. (120 U. S. R., 227), Cross Appeals from Court of Claims.

Appeal of the United States *No.* 728, docketed October 16, 1885. That of the R. R. Co. *No.* 1303, docketed December 7, 1886. No motion made to dismiss and the court allowed on the latter appeal some $80,000 more than the court below.

This last case is the only one cited as coming from the Court of Claims. The special rules of this court

governing appeals from that court prescribe no time in which they must be docketed. Rule IX of the general rules should not be strictly applied to such appeals. The statute (R. S., 708), requires them to be taken within 90 days after judgment, while appellants from the circuit courts are allowed two years.

The question has never heretofore been raised in appeals from the Court of Claims. Under the rules, the record is requested to be in a certain form. Only one is necessary. No harm can be done to an appellant who has filed a transcript if a cross-appellant does not file a duplicate.

The question is, therefore, one only of the clerk's fees, and these being satisfied, and no motion to dismiss having been made, the court, whatever rule it may lay down for the future, should not, it is submitted, dismiss this appeal of its own motion.

II.

As to judicial notice of Congressional documents.

Blake *vs.* Nat. Bank, 23 Wall., 307.

U. S. *vs.* Pacific R. R., *supra*.

Robt. B. Lines

25 v 195+176

JAN 31 1888

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 698.—HOWARD POTTS *v.* THE UNITED STATES.
No. 1332.—JABEZ BURCHARD *v.* THE UNITED STATES.
No. 158.—THE UNITED STATES *v.* JABEZ BURCHARD.

APPEALS FROM THE COURT OF CLAIMS.

In the Supreme Court of the United States

OCTOBER TERM, 1887.

No. 698.—HOWARD POTTS *v.* THE UNITED STATES.
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No. 158.—THE UNITED STATES *v.* JABEZ BURCHARD.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

THE GOVERNMENT'S COUNTER-CLAIM.

The findings of fact of the Court of Claims show that Burchard and Potts were assistant engineers in the Navy; that they were examined by medical retiring boards and found incapacitated from active service, but the board found that the incapacity did not originate in the line of duty. The President concurred in and approved the reports of the retiring board, and directed Burchard and Potts to be retired on furlough pay. Subsequently the President nominated the respective claimants for transfer from the furlough to the retired-pay list under section 1594 of the Revised Statutes, and the United States Senate

consented to the nominations. (Potts's Rec., 2, 3; Burchard's Rec., 2, 3, 4.)

Thus far the facts in these cases are alike. Upon these facts the Court of Claims dismissed Burchard's petition with an opinion of the court. (Burchard's Rec., 5, 6. 7.)

Potts's case was dismissed because the points in it, upon the findings, were exactly similar to those in the Burchard case. (Potts's Rec., 3.)

But there is a question in the Burchard case that does nor arise upon the Potts record, namely, a plea of counter-claim, which was interposed on behalf of the Government (Burch. Rec., 2). The facts upon this point are found in findings numbers II, III, and IV. (Burch. Rec., 3, 4.)

It appears as a fact that the Secretary of the Navy undertook to review the findings of the naval retiring board in Burchard's case, and addressed to the Fourth Auditor of the Treasury the following communication:

NAVY DEPARTMENT,
March 1st, 1877.

SIR: Upon full review of all the facts in the case of Assistant Engineer Jabez Burchard, U. S. Navy, the Department is of the opinion that the causes which incapacitated him for active duty were incident to the service, and that he should have the higher rate of pay allowed to retired officers by section 1588 of the Revised Statutes.

Very respectfully,

GEO. M. ROBESON,
Secretary of the Navy.

Hon. S. J. W. TABOR,
4th Auditor.

One year later the Secretary of the Navy submitted to the President the nomination of Burchard for transfer from the furlough to the retired pay list of the Navy under section 1594 of the Revised Statutes. (Burch. Rec., 3.)

On March 1, 1878, the President sent to the Senate the nomination for the transfer of Burchard from the furlough to the retired pay list of the Navy *from 26th October*, 1874. (Burch. Rec., 4.)

April 1, 1878, the Secretary of the Navy notified Burchard of his transfer from the furlough to the retired pay list nder section 1594, Revised Statutes, *from 26th October*, 1874, agreeably to the confirmation of the Senate. (Burch. Rec., 4.)

Burchard then received the back pay from 26th October, 1874, to 1st April, 1878, being the difference between furlough pay and the 75 per cent. mentioned in clause 1 of section 1588 of the Revised Statutes, the overpayment amounting to $2,656. (Burch. Rec., 4, 7.)

A counter-claim was filed by Assistant Attorney-General Simons for only $1,168.75. (Burch. Rec., 2.)

The Court of Claims found that the United States would be entitled to recover on the counter-claim the sum of $2,656; but, in order that the case might be heard in the Supreme Court, dismissed the counter-claim. From this decision and ruling of the court the United States has appealed.

AN ASSIGNMENT OF ERROR

is made on behalf of the United States as follows:

The Court of Claims erred in dismissing the counter-

claim of the United States against Jabez Burchard, upon the findings of fact, and in not entering judgment thereon in favor of the United States against said Burchard for the sum found by said court to have been overpaid to him.

Upon the counter-claim three questions are presented: (1) Had the Secretary of the Navy authority to review and reverse the findings of the retiring board and the approval of the President; (2) had the President by a nomination made March 1, 1878, and the Senate by a confirmation, consented to March 25, 1878, the power to antedate the commission of Burchard in the transfer from the furlough to the retired-pay list, so that his salary in the latter position would begin October 26, 1874, instead of the day of his appointment under the nomination and confirmation; (3) can the amount thus paid to Burchard, whether by mistake of law, or fact, or both, be recovered back.

As to the first of these questions it is clear that the Secretary of the Navy had no such authority conferred upon him by law. The reasoning in the opinion of the court below is not only convincing but conclusive. (Burch. Rec., p. 6, par. 2; 16 Opinions Attorney-General, 22.)

The second question should, we think, also be answered in the negative.

The retiring board found the facts concerning Burchard's incapacity as required by law. (Rev. Stats., secs. 1448 to 1454.)

The findings of the board placed Burchard under the provisions of section 1454. Everything subsequent to this finding depended upon the exercise of a discretionary power vested in the President. (1) It was discretionary

with him whether he approved the finding of the board, or rejected it. (2) If he approved it, he could in his discretion do one of two things, namely, retire Burchard from active service on furlough pay, or retire him wholly from such service with one year's pay. (Rev. Stat., sec. 1454.)

The facts show the President approved the findings of the retiring board, and retired Burchard from active service on *furlough pay*. (Burch. Rec., 3)

So far as fixing the status of Burchard as a retired officer in the Navy, and his pay in such capacity, this action of the President was a finality, from which there was but one way of escape, namely, his *transfer* from the *furlough* to the *retired pay-list* by the President, with the advice and consent of the Senate, under section 1594 of the Revised Statutes.

The President made the nomination for the transfer of Burchard under section 1594, *on March* 1, 1878, *but antedated it to take effect* 26*th October*, 1874 (Burch. Rec., 4). The Senate advised and consented to the appointment or transfer *from* 26*th October*, 1874, agreeably to the nomination On April 1, 1878, the Secretary of the Navy notified Burchard of such transfer. (Burch. Rec., 4.)

Burchard then received from the Treasury by virtue of such antedated appointment the sum of $2,656, being the difference between $1,275 and $500 a year from 26th October, 1874, to 1st April, 1878.

It is contended on behalf of the Government that the sum paid to Burchard in consequence of his antedated appointment should be recovered back. That under section 1594 authorizing the transfer, which was made in behalf

of Burchard, the appointment could not lawfully be antedated by the President, nor could the Senate lawfully consent to such an antedated appointment. That that part of the appointment and confirmation is a nullity, both as to Burchard's position and as to the regulation of his salary.

That Burchard's appointment to the retired pay list began on 1st April, 1878, pursuant to his confirmation and notice (Burch. Rec., p. 4). Under the law it had no retroactive force or application (4 Opinions, 603; *Collins' case*, 15 C. Cls. R., 34).

Burchard was retired on furlough pay October 26, 1874 (sec. 1454), and remained on the furlough pay list until April 1, 1878, and was entitled during that period, under section 1593, to only one-half of the pay to which he would have been entitled if on leave of absence on the active list. His pay on leave of absence on the active list is fixed by section 1556 at $1,000 per year.

The finding of the retiring board, and the approval of the President, expressly show that Burchard was not retired for any of the reasons mentioned in the first clause of second 1588, but, as stated, for other reasons. He was not entitled to pay under this clause. If, then, he does come within the provisions of the second clause, which provides pay for *all* other officers on the retired list, he is not entitled to any pay whatever.

The court below found that he belonged to the retired officers of the second clause, and that he was entitled to $500 per year from October 26, 1874, to April 1, 1878. This, we think, is a correct application of the law. It is plain, therefore, that upon a proper application and in-

terpretation of the statutes, Burchard has received $2,656 in overpayment for his services from October 26, 1874, to April 1, 1878.

The Court of Claims (16 Opinions Att'y Gen'l, 22,) so found, but inasmuch as the petition was ordered to be dismissed, the counter-claim was also dismissed for the purpose of giving the Supreme Court an opportunity to pass upon the whole case.

It must be admitted that the counter-claim states a much less amount than we are entitled to recover back; and also that the period of time during which Burchard was unlawfully paid is erroneously stated. (Burch., Rec., p. 2.)

The plea does show, however, the ground upon which the Government seeks to recover. The facts relied on are stated. Only the time and amount are erroneously pleaded. This court has held that—

> Forms of pleading in the Court of Claims do not preclude claimant from recovering what is justly due him on facts stated in his petition. (Clark *v.* U. S., 95 U. S., 539.)

It seems that the above rule of law is sufficiently broad to include, and extend to, the Government's right to recover the $2,656 found due by the Court of Claims.

It has been shown by the facts as found, and upon a proper interpretation and application of the statutes, in our opinion, that there is due to the United States from Burchard the sum of $2,656. Can this be recovered back? Burchard's case is analogous to McElrath's case. (102 U. S. R., 439–441; 12 C. Cls., R. 201–312.)

If we are not under a misapprehension, Burchard's account as an officer has always been open, and never closed in any sense of the word. The findings of fact do not show that any part of it has ever been closed. He, like McElrath, is dissatisfied with his account, and has expressed that dissatisfaction in a petition to the Court of Claims. (Burch. Rec., 1.)

The Attorney-General invoked the provisions of section 1061 of the Revised Statutes to recover from Burchard money paid to him on his salary account to which he was not entitled. It would be a great injustice to permit Burchard to declare a part of his account, with which he is dissatisfied because, as he claims, he has not been paid what is due him, open for adjudication in the courts, and at the same time to say that the part thereof upon which he has been overpaid, as shown by the findings of the court below, is not open to such adjudication. This would not be in accordance with the doctrine laid down in McElrath's case.

That the Government has the legal right to recover back the money paid to Burchard, and to which he has no right or title, is established by the authorities cited below:

Fenemore *v.* United States, 3 Dall., 357.
Moses *v.* McForlan, 2 Burr., 1002.
Northrop *v.* Graves, 19 Conn., 548.
McElrath *v.* United States, 102 U. S. R., 439-441.
Same, 12 C. Cls. R., 201-312.
Looney *v.* District of Columbia, 19 C. Cls. R., 233.
Charles *v.* United States, *ibid.*, 318.
Neitzey *v.* United States, 17 C. Cls. R., 111.

Barnes *v.* District of Columbia, 22 C. Cls. R., 393–3
Bonafon *v.* United States, 14 C. Cls., R., 492–3.
United States *v.* City Bank, 6 McLean, 130.

Burchard can not present a fragment of his account and recover thereon. He must rely on the account in its entirety.

It is submitted, therefore, that in any view of the case the Government, upon the facts found by the court below, and upon the law, is entitled to recover from Burchard, upon the counter-claim, the amount so overpaid him, and the Court of Claims erred in dismissing such counter-claim.

PETITIONS OF BURCHARD AND POTTS.

We turn now to the assignments of error made on behalf of Burchard and Potts, and ask: Did the Court of Claims err upon the facts found in each case in dismissing the petitions?

But, before presenting our views upon the merits of the appeal, we desire to call the attention of the court to the following facts:

The judgment in Burchard's Case was entered February 4, 1884. (Rec., p. 7.)

The appeal to the Supreme Court was prayed for by Burchard's counsel May 2, 1884, and allowed May 12, 1884. (Rec., p. 8.)

The appeal was docketed and the record filed in the Supreme Court January 7, 1888.

The appeal appears to have been properly granted under the law (sec. 708), but has it been docketed and the record filed in this court as required by Rule 9, page 11?

The appeal should have been docketed and the record filed within the first six days of the October term 1884. This was not done.

The appeal appears to have been docketed, and the record filed in time under the rule, in Potts's case.

The questions in controversy have been so fully and thoroughly stated in the opinion in Burchard's case, that little, if anything, can be added to strengthen the position of the Government.

All of the doubts in the retirement of Potts and Burchard have been determined in their favor, both in the application of the law and the facts.

The returning board found as a fact, in passing upon the incapacity of each appellant, that the incapacity was not the result of any incident of the service. (Sec. 1451.)

The decisions and proceedings were laid before the President by the Secretary of the Navy. (Sec. 1452.)

The President exercised his discretion upon the record so laid before him, and, in approval, retired the respective appellants on furlough pay, instead of wholly retiring them with one year's pay (sec. 1454).

The President was empowered in his discretion to do one of three things under the law, (1) to approve the proceedings of the retiring board, or (2) to disapprove the same, and (3) upon approval to retire the appellants on furlough pay (as was done), or to wholly retire them from active duty with one year's pay.

There can be no dispute, therefore, up to this point as to where the appellants belonged. They were retired on furlough pay, which was one-half of leave of absence pay on active duty (sec. 1593).

Such leave of absence pay was $1,000 a year for Burchard and $1,200 for Potts (sec. 1556). The appellants, from the date of their respective retirement on furlough pay until their transfer by the President and Senate, were only entitled to one-half of the prescribed leave of absence pay.

By the transfer made by the President, with the advice and consent of the Senate, under section 1594, Revised Statutes, the appellants became entitled, respectively, to $850 and $950 a year thereafter. The increased pay began with the date of the transfer from one list to the other.

The court below held, and the Government by its counsel contend, that the pay of appellants, beginning with the date of transfer, is controlled by the second clause of section 1588, which reads as follows:

> The pay of all other officers on the retired list (excluding those above specified) shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them at the time of retirement.

They most assuredly do not come within the first clause of the said section. They were deprived of its provisions by the findings of the retiring board and the approval of the President. The manner of retirement under the law fixes and controls the pay.

The construction of the statutes leads unerringly to the above conclusion. Is there anything in the facts to change this application of the law? We think not.

The assertion of counsel that the President and Senate had found that the respective appellants had lost their health in the service, notwithstanding the finding of the

retiring board, and that they had been unjustly treated by such board, is not warranted or justified by the findings of the Court of Claims. (Applt's brief, p. 7.)

No such facts are in the record. Nor did the transfer of appellants depend upon the existence of any such facts. It was the President who finally decided the status of the appellants, and not the board. His opportunity to review the proceedings of the board occurred when he made the approval, and the proceedings ceased to be reviewable thereafter by him, or any person or tribunal. The transfer was not a review of former proceedings, but a power conferred upon the President regardless thereof. The opinion of the Attorney-General is a proper interpretation of the statutes. (16 Opinions, 22.)

The infallibility of retiring boards, and the perfunctory approvals of Presidents, will not find much room, we trust, for consideration upon the facts as reported in these cases by the court below.

Section 1594 authorizes the President to make a transfer from one list to another, with the consent of the Senate. This does not authorize new legislation, but simply a transfer, as held by the court below. It does not affect the proceedings of the retiring board. (Magaw *v.* United States, 16 C. Cls. R., 3; Morse *v.* United States, *ibid.*, 12.)

We fail to see any ambiguity in the statutes. The Court of Claims did not find it necessary in the interpretation thereof to refer to the original statutes in *Magaw's Case* (*supra*).

That the cause of incapacity is a question of fact for the retiring board in the first instance is not controverted; but that the approval of the President and the retirement

of the appellants thereunder according to law is a finality and conclusive of such proceedings is insisted upon. Congress might have empowered the President and the Senate to retry and decide the cases anew, but it has not done so.

The court did not err, therefore, in finding that Burchard was entitled, after April 1, 1878, to receive $850 a year under the second clause of section 1588, Revised Statutes, and in dismissing the petition.

Nor did the court err in making a similar finding except as to the date and amount—$950 per year—and in dismissing Potts's petition.

It is evident that Potts and Burchard have been receiving the pay authorized by law since their respective transfers, and that they are not entitled to pay under the first clause of section 1588, Revised Statutes, as claimed in the petitions.

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